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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 MICHAEL CROW,

11 Plaintiff,

12 v.

13 SUE BAUER, *et al.*,

14 Defendants.

No. C09-5782 RJB/KLS

**REPORT AND RECOMMENDATION
NOTED FOR: March 26, 2010**

15 This civil rights action has been referred to the undersigned United States Magistrate
16 Judge Karen L. Strombom pursuant to Title 28 U.S.C. § 636(b)(1) and Local MJR 3 and 4. On
17 February 2, 2010, the court granted the application of Plaintiff Michael Crow to proceed *in*
18 *forma pauperis*. Dkt. 5. Following review of Mr. Crow's civil rights complaint (Dkt. 6), the
19 court granted Mr. Crow leave to file an amended complaint or to show cause why this matter
20 should not be dismissed for failure to state a claim, on or before February 26, 2010. Dkt. 7. Mr.
21 Crow has failed to file an amended complaint or show cause explaining why this matter should
22 not be dismissed for failure to state a claim under 42 U.S.C. § 1983.
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24 The undersigned recommends that this action be dismissed without prejudice and that the
25 dismissal count as a strike pursuant to 28 U.S.C. § 1915 (g) for failure to state a claim.
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DISCUSSION

A complaint is frivolous when it has no arguable basis in law or fact. *Franklin v. Murphy*, 745 F.2d 1221, 1228 (9th Cir. 1984). When a complaint is frivolous, fails to state a claim, or contains a complete defense to the action on its face, the court may dismiss an *in forma pauperis* complaint before service of process under 28 U.S.C. § 1915(d). *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir. 1987) (*citing Franklin v. Murphy*, 745 F.2d 1221, 1227 (9th Cir. 1984)). A complaint or portion thereof, will be dismissed for failure to state a claim upon which relief may be granted if it appears the “[f]actual allegations . . . [fail to] raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.” See *Bell Atlantic, Corp. v. Twombly*, 540 U.S. 544, 127 S.Ct. 1955, 1965 (2007)(citations omitted). In other words, failure to present enough facts to state a claim for relief that is plausible on the face of the complaint will subject that complaint to dismissal. *Id.* at 1974.

The court must construe the pleading in the light most favorable to plaintiff and resolve all doubts in plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). Unless it is absolutely clear that amendment would be futile, however, a *pro se* litigant must be given the opportunity to amend his complaint to correct any deficiencies. *Noll*, 809 F.2d at 1448.

Although complaints are to be liberally construed in a plaintiff’s favor, conclusory allegations of the law, unsupported conclusions, and unwarranted inferences need not be accepted as true. *Id.* While the court can liberally construe plaintiff’s complaint, it cannot supply an essential fact an inmate has failed to plead. *Pena*, 976 F.2d at 471 (*quoting Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

To state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law and that (2) the

1 conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws
2 of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*,
3 *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an
4 alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350,
5 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

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7 A plaintiff must also allege facts showing how each individually named defendant caused
8 or personally participated in causing the harm alleged in the complaint. *Arnold v. IBM*, 637 F.2d
9 1350, 1355 (9th Cir. 1981). A defendant cannot be held liable under 42 U.S.C. § 1983 solely on
10 the basis of supervisory responsibility or position. *Monell v. New York City Dept. of Social*
11 *Services*, 436 U.S. 658, 694 n. 58 (1978). A theory of *respondeat superior* is not sufficient to
12 state a § 1983 claim. *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982).

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14 On the basis of these standards, the undersigned concluded that Mr. Crow has failed to
15 state a claim upon which relief can be granted. Dkt. 7, pp. 2-3. Mr. Crow purports to sue a
16 Cowlitz County prosecutor and two Longview Police Officers, claiming that he is being falsely
17 held in the Cowlitz County Jail for a crime he did not commit. Dkt. 6, p. 3. Mr. Crow alleges
18 that his confinement continues even though the guilty party has written a letter to the judge,
19 prosecutor and Mr. Crow's attorney, admitting his guilt and stating that he deceived Mr. Crow
20 into helping him. *Id.* Mr. Crow seeks immediate release from prison, monetary compensation
21 for emotional and mental distress, and the appointment of a lawyer to help him litigate this
22 matter. *Id.*, p. 4.

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24 To state a claim under 42 U.S.C. § 1983, at least two elements must be met: (1) the
25 defendant must be a person acting under color of state law, (2) and his conduct must have
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1 deprived the plaintiff of rights, privileges or immunities secured by the constitution or laws of
2 the United States. *Paratt v. Taylor*, 451 U.S. 527, 535 (1981).

3 This action challenges the propriety of ongoing criminal proceedings in Cowlitz County
4 state court. Generally, federal courts will not intervene in a pending criminal proceeding absent
5 extraordinary circumstances where the danger of irreparable harm is both great and immediate.
6 See *Younger v. Harris*, 401 U.S. 37, 45-46 (1971); see also *Fort Belknap Indian Community v.*
7 *Mazurek*, 43 F.3d 428, 431 (9th Cir.1994), cert. denied, 116 S.Ct. 49 (1995) (abstention
8 appropriate if ongoing state judicial proceedings implicate important state interests and offer
9 adequate opportunity to litigate federal constitutional issues); *World Famous Drinking*
10 *Emporium v. City of Tempe*, 820 F.2d 1079, 1082 (9th Cir.1987)(Younger abstention doctrine
11 applies when the following three conditions exist: (1) ongoing state judicial proceeding; (2)
12 implication of an important state interest in the proceeding; and (3) an adequate opportunity to
13 raise federal questions in the proceedings).

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16 Only in the most unusual circumstances is a petitioner entitled to have the federal court
17 intervene by way of injunction or habeas corpus until after the jury comes in, judgment has been
18 appealed from and the case concluded in the state courts. *Drury v. Cox*, 457 F.2d 764, 764-65
19 (9th Cir.1972). See *Carden v. Montana*, 626 F.2d 82, 83-84 (9th Cir.), cert. denied, 449 U.S.
20 1014 (1980). Extraordinary circumstances exist where irreparable injury is both great and
21 immediate, for example where the state law is flagrantly and patently violative of express
22 constitutional prohibitions or where there is a showing of bad faith, harassment, or other unusual
23 circumstances that would call for equitable relief. *Younger*, 401 U.S. at 46, 53-54.
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1 Here, the Plaintiff has not plead any extraordinary circumstances warranting intervention
2 by this Court in any ongoing state proceeding. He has also not plead any violation of rights
3 protected by the Constitution or federal statute.

4 In addition, when a person confined by government is challenging the very fact or
5 duration of his physical imprisonment, and the relief he seeks will determine that he is or was
6 entitled to immediate release or a speedier release from that imprisonment, his sole federal
7 remedy is a writ of habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). In order to
8 recover damages for an alleged unconstitutional conviction or imprisonment, or for other harm
9 caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983
10 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged
11 by executive order, declared invalid by a state tribunal authorized to make such determination, or
12 called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.
13 *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994).

14 In this case, Mr. Crow requests monetary compensation for his unlawful incarceration.
15 Dkt. 6, p. 4. As noted above, however, before a prisoner may sue to recover damages for an
16 alleged unconstitutional conviction or imprisonment, or for other harm caused by actions whose
17 unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that
18 the conviction or sentence has been reversed on direct appeal, expunged by executive order,
19 declared invalid by a state tribunal authorized to make such determination, or called into
20 question by a federal court's issuance of a writ of habeas corpus.

21 The court noted further that Plaintiff purports to sue the Cowlitz County prosecutor, Sue
22 Bauer. Plaintiff was advised that a state prosecuting attorney who acts within the scope of his or
23 her duties in initiating and pursuing a criminal prosecution and presenting the State's case is

1 absolutely immune from a suit brought for damages under 42 U.S.C. § 1983, *Imbler v.*
2 *Pachtman*, 424 U.S. 409, 424, 427 (1976); *Ashelman v. Pope*, 793 F.2d 1072, 1076, 1078 (9th
3 Cir. 1986) (en banc), “insofar as that conduct is ‘intimately associated with the judicial phase of
4 the criminal process,’” *Burns v. Reed*, 500 U.S. 478, 486 (1991)(quoting *Imbler*, 424 U.S. at
5 431). This is so even though the prosecutor has violated a plaintiff’s constitutional rights, *Broam*
6 *v. Bogan*, 320 F.3d 1023, 1028-29 (9th Cir. 2003), or the prosecutor acts with malicious intent,
7 *Genzler v. Longanbach*, 410 F.3d 630, 637 (9th Cir.), cert. denied, 546 U.S. 1031, 126 S.Ct. 736,
8 546 U.S. 1031, 126 S.Ct. 737, 546 U.S. 1032, 126 S.Ct. 749 (2005); *Ashelman*, 793 F.2d at 1078.

10 In light of the deficiencies noted above, the court declined to serve Mr. Crow’s
11 complaint, but gave him an opportunity to show cause why this matter should not be dismissed.
12 Mr. Crow did not respond to the court’s order to show cause.

13 CONCLUSION

14 Mr. Crow was carefully instructed as to the elements of a Section 1983 action and was
15 given ample opportunity to respond to the court’s order to show cause. Construing the complaint
16 in the light most favorable to him and resolving all doubts in his favor, it is clear that has failed
17 to state a claim on which relief may be granted.

19 Plaintiff has failed to state a claim as a matter of law under 42 U.S.C. § 1983. The action
20 should be **dismissed without prejudice, and the dismissal counted as a strike pursuant to 28**
21 **U.S.C. 1915 (g).** Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil
22 Procedure, the parties shall have fourteen (14) days from service of this Report and
23 Recommendation to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections
24 will result in a waiver of those objections for purposes of appeal. *Thomas v. Arn*, 474 U.S. 140
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1 (1985). Accommodating the time limit imposed by Rule 72(b), the Clerk is directed to set the
2 matter for consideration on **March 26, 2010**, as noted in the caption.

3 DATED this 4th day of March, 2010.

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7 Karen L. Strombom
8 United States Magistrate Judge
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